2005

Steven Blevins and Debra Kay Blevins v. Custom Steel Fabrication : Brief of Appellees

Utah Court of Appeals

Steven and Debra Blevins; Pro Se.
Michael A. Jensen; Attorney for Appellants/defendants.

IN THE UTAH COURT OF APPEALS

STEVEN BLEVINS AND DEBRA KAY BLEVINS, Apellees/Plaintiffs, vs. CUSTOM STEEL FABRICATION, INC., ET AL Apellants/Defendants	BRIEF OF APPELLEES CASE NO. 20050719-CA Third District Court No. 000906072

BRIEF OF APPELLEES

Appeals from the Third District Court, Judge L. A. Dever

Pro Se
Steven and Debra Kay Blevins
10758 S. 1090 E.
Sandy, UT 84094
801-571-7601
Appellee/Plaintiffs

Michael A. Jensen (#7231)
Attorney at Law
PO Box 571708
Salt Lake City, Utah 84157-1708
801-519-9040; Fax: 519-9264
Attorney for Appellants/Defendants

TABLE of CONTENTS

TABLE of AUTHORITIES

Statement of the Case

Nature of the Case: Again Mr. Jensen includes an error ridden summary of the events leading to this appeal. I did not bring the garnishment action and Mr. Jensen has failed to prove breach of contract to two courts.

Summary of Argument

It is difficult to reply to a 47 page shotgun blast of errors briefly. I will just offer a reply of what is probably already obvious to this Court, trusting the rest to its discernment. I believe ISSUE No. 1 is shown defective by "Utah Standards of Appellate Review" (I.A.2. (summary)), that Mr. Jensen fails to correctly marshal the evidence, much less prove clear error. ISSUE No. 2 is concerned with the form of findings and billable time. A review of the trial court's 7 page judgment in the light of all of *Salmon v Davis County, Cabrera v Cottrell, Beckstrom v Beckstrom, Dixie State Bank v Bracken,* and *Valcarce v Fitzgerald* shows that the trial court has substantially used its discretion according to the law.

Two focal points of Mr. Jensen's appeal are *Salmon v Davis County* and Mr. Orton's affidavit. Mr. Jensen's applications of *Salmon* are defective and just plain wrong. This guts the usefullness of Mr. Orton's affidavit. Because the court that made the award was not the court that tried the case, and the Supreme Court upheld the substantial redcution of attorney fees on minimal findings anyway, *Salmon* has very limited application here.

ARGUMENT

Response to Issue No. 1:

I. Repeatedly Mr. Jensen claims that the trial court approved his rate (p. 11 "Brief of Appellants", hereinafter "BofA"). All the court approved was the amount submitted. The judge made this clear in open court. The trial court has some 900 cases, so brevity is necessary, not every detail of a ruling can be specified.

It took 20 visits or phone calls for me to get two affidavits that met the trial courts request. My requests, which included large firms, were generally met with indifference to condescension. I had no aquaintance with either of the attorneys that submitted affidavits, and they did not know each other. Their rates were not substantially less than those of Mark Bell and Ronald Dunn, attorneys I have retained in the Salt Lake area, but having more experience. Mr. Jensen has an obvious advantage over me in obtaining affidavits and determining what the rates are likely to be. Surely Mr. Jensen knows a solo practitioner, so why did all 3 of his affidavits come from large firms?

The affiants submitted by Mr. Jensen do not specify their own rates, (except Mr. Orton, which doesn't apply) but offer opinions on the rates of unspecified others, (R. 800-803) and those rates vary considerably. Thus the affidavits that I submitted are more appropriate to the trial court's request and findings process.

I.A. Mr. Jensen contends that the trial court erred when taking into consideration the size of the firm (p. 14 "BofA"), but size has a bearing on types and costs of services. One may fly Delta, first class, or Southwest, coach, for a great deal less. It is a matter of

discretion or choice and many do not feel compelled to pay more. On a resume', would a prospective employer consider time with a large firm part of your 'experience' or part your 'situation'? Part of that experience is supervision and consultation with senior members, which is not available to solo practices. One would question whether Mr. Jensen could provide all the services a large firm offered if one required them. Also, a large firm would not tolerate a member taking an assignment of interest in a case, as Mr. Jensen has in this case.

I.B. Mr. Hartill's affidavit speaks for itself (R.822); in context the meaning of "courtroom work" is evident. Mr. Jensen repeatedly offers his conjecture as fact (p.17 "BofA"). No authoritative evidence is offered; if it were, Mr. Jensen would have no argument because $125/hr is what Mr. Hartill charges unless he is in a courtroom.

I.C. Mr. Jensen contends (p.18 "BofA") the trial court erred because it did not allow for a raise in his rates over the period. The affidavits stated rates as of April, 2005. Mr. Hartill states that he has not raised his rates in the 5 years since 2000. (Quoted and emphasized by Mr. Jensen at p.13, "Brief of Appellants") If not for that statement, by Mr. Jensen' logic, the trial court would have reason to reduce his rates further for work in the beginning years.

Mr. Jensen's own reasoning at p. 20, par. 2, "BofA" poisons his arguments about reasonable rates. His questions logically show that the minimum end of the range of fee rates is just as valid as the upper end. What error is there if the court should choose a minimalist approach? By his own observations at p.47, "BofA", the trial court is middling.

Response to Issue No. 2:

As to attorney fees, in *Valcarce v Fitzgerald,* filed June 26, 1998, the Utah Supreme Court stated after listing the four factors from *Dixie State Bank v Bracken*, "Despite this listing of issues, in *Dixie* State *Bank* we took care to note that what an attorney bills or the number of hours spent on a case is not determinative. " (emphasis mine)

II.A. As to findings of fact, *Cabrera v Cottrell,* (694 P.2d 625) says,

"In the instant case, the trial court did not enter separate findings of fact and conclusions of law, at least denominated as such. However, the order and judgment did contain findings of fact and legal conclusions, including the finding that the award was reasonable. As a matter of form, it would have been preferable for the trial court to have entered separate findings of fact and conclusions of law in addition to the order and judgment for attorneys fees, but the order and judgment are not defective because they are combined with findings and conclusions."

This is what Judge Dever has done.

As to arguments Mr. Jensen makes, based on *Salmon v. Davis County* at pp. 21, 25, 27, and 37 of his Brief, he repeatedly quotes minority opinions or makes application out of context. The actual background of *Salmon v.Davis County*, is "different from most attorney fee cases in that the circuit court judge who heard Salmon's two misdemeanor trials did not make the fee award decision." (916 P.2d 893) Moreover, after grousing at the minimal findings, (as noted and emphasized in "Brief of Appellants", p. 25), Justice Zimmerman

"conclude(s) that the trial court's findings are minimally sufficient to withstand a remand. The trial court made clear that it considered the evidence in light of some the factors outlined in *Cottonwood Mall,* 830 P.2d at 269, even if the court failed to make any findings relative to those factors." (694 P.2d 901)

In the light of the salient portions of *Salmon*, as well as the rest of the circumstances of this case, Mr. Orton's affidavit seems way out of bounds, possibly explaining why the trial court largely disregards it.

Inconsistencies and Other Factors

Starting at p.28, "BofA", Mr. Jensen contends with the trial court's findings relating to his time spent. If Mr. Jensen makes so many inconsistent statements of fact in hopes that I can not address them all, he succeeds.

Mr Jensen repeatedly complains the trial court did not abide by Rule 34(d), *Utah R. App. P.(*p. 39, "BofA"). He omits that the trial court received my objection the same day he applied for a judgment. I submitted my objection 8 court days after notice, I was told I had 10 days. For $500+ that he got anyway, Mr. Jensen expended a great amount of time and effort. This same judge conditionally vacated a default judgment of more than $30,000. far past 90 days old for Mr. Jensen and the same client. If Mr. Jensen is a religious man, the Golden Rule must not be a part of his ethic.

Mr. Jensen cleverly used his client's bankruptcy in the spring of 2002, (See R. 506-509 for discussion of automatic stay and R. 527 for Judge Pappas' order) causing complications in this case and bearing on the "mini-litigation" mentioned at p.34, "BofA".

Not reflected in Mr. Jensen's billing affidavits are numerous stunts the trial court has had to endure, such as a hastily prepared defective Order in Supplemental Proceedings that caused a bench warrant to be issued against me. It had to be quashed.

Judge Dever has endeavored to follow the remand instructions of this Court. His

"Judgment and Order", especially at p.3 (R. 843) shows that he made a detailed review of the billing and compared it "to the work product supplied to the Court". He did not say that his findings were exhaustive. His decision is subject to these rulings:

"Calculation of reasonable attorney fees is in the sound discretion of the trial court, and will not be overturned in the absence of a showing of a clear abuse of discretion." *Dixie State Bank v. Bracken,* 764 P.2d 985, 988 (Utah 1988) and

"the trial judge was not necessarily compelled to accept such self-interested testimony whole cloth and make such an award; and in the absence of patent error or clear abuse of discretion, this court will not disturb his findings or judgment." (footnote omitted), *Beckstrom v. Beckstrom,* 578 P. 2d 520, 524 (Utah 1978)

Conclusion

This Court is in the very unenviable position of finding clear, reversible error in a great cloud of confusion. Mr. Jensen mostly has difficulty with the trial court's discretion.

The cases cited and experience show what Mr. Jensen observes, (p.47 "Brief of Appellants") "As it is now, fees can be from 10% to 100% of the amount requested ...." His own statement shows the this trial court's findings are not excessive. Many of Mr. Jensen's clients do find his rates and methods excessive; I stopped counting at 7 the number of clients he has sued for debt collection. It seems wise to have the trial courts evaluate attorney efficiency and discourage predatory behaviour.

I wonder if there is some overarching principle, some principle of restraint, some point of looking at the forest and not the trees that the courts abide by. Mr. Jensen's dispute with the courts, not me, has turned this purely self-interested pursuit of attorney fees from a "satellite litigation" to a solar system litigation.

Appellees pray for an affirmation of the trial court's decision and whatever other relief this Court deems equitable.

DATED December 28, 2005

Steven C. Blevins

Debra Kay Blevins

CERTIFICATION of SERVICE Case No. 20050719-CA

I, Steven Blevins certify that on December 28, 2005 I served two copies of the attached Appellee's Brief upon Michael A. Jensen, the counsel for the apellant in this matter, by mailing them to him by first class mail with sufficient postage prepaid to the following address:

Michael A. Jensen
PO Box 571708
Salt Lake City, UT 84157-1708

AND hand delivered 8 copies to the Court of Appeals on December 28, 2005.